No. 73-989

In the Supreme Court of the United States

OCTOBER TERM, 1973

GEORGE DE MET,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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To: The Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States.

The Petitioner, George De Met, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit affirming a judgment of conviction entered by the United States District Court for the Northern District of Illinois, Eastern Division.

OPINION OF THE COURT BELOW

The Opinion of the United States Court of Appeals for the Seventh Circuit in *United States of America* v. *George DeMet*—No. 72-1657, was entered on October 25, 1973, but is not yet officially reported. It is printed in the Appendix to this Petition. (App. 1) [1]

JURISDICTION

The judgment of the Court of Appeals affirming the conviction in the District Court was entered on October 25, 1973. A timely Petition for Rehearing was denied on November 26, 1973.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether the necessary relationship to interstate commerce can be satisfied by a government sponsored theory, unsupported by proof.

2. Whether Title 18, U.S.C. §1951 will be literally interpreted, even though its legislative history does not contemplate a case such as the instant case, and even though it conflicts with another federal statute, to wit: Title 27, U.S.C. §121, and with the Twenty-First Amendment to the Constitution of the United States.

3. Whether a clear case of bribery of a police officer, in exchange for foregoing his official duties, can be converted into extortion under the Hobbs Act.

4. Whether the application of the extortion rationale under the Hobbs Act to a case of simple bribery of a police

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[1] "App. ....." denotes Appendix to this Petition

officer does not upset the Federal-State balance, which this Court refused to do in *United States* v. *Enmons*, 93 S.Ct. 1007.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I. Section 8. Clause 3 of the Constitution of the United States:

> Section 8. Clause 3. Regulation of commerce
> To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

Section 2 of the Twenty-First Amendment to the Constitution of the United States:

> SECTION 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Section 1951, Title 18 U.S.C.A. provides in pertinent part:

> § 1951. Interference with commerce by threats or violence
>
> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.
>
> (b) As used in this section—
>
> * * *

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

* * *

Section 1952 Title 18 U.S.C.A.:

§ 1952. Interstate and foreign travel or transportation in aid of racketeering enterprises

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise, promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gam-

bling, liquor on which the Federal excise tax has not been paid, narcotics or controlled substances (as defined in section 102(6) of the Controlled Substances Act), or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor shall be conducted under the supervision of the Secretary of the Treasury. As amended Pub.L. 91-513, Title II, § 701(i) (2), Oct. 27, 1970, 84 Stat. 1282.

Title 27 U.S.C.A., Section 121:

§ 121. State statutes as operative on termination of transportation: original packages. All fermented, distilled, or other intoxicating liquors or liquids transported into any State or Territory or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such state or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise. (Aug. 8, 1890, c. 728, 26 Stat. 313.)

Chapter 43, Illinois Revised Statutes Section 115,

(b) A distributor's license shall allow the wholesale purchase and storage of alcoholic liquors and sale of alcoholic liquors to licensees in this State and to persons without the State, as may be permitted by law.

(c) An importing distributor's license may be issued to and held by those only who are duly licensed distributors, but upon the filing of an application by

a duly licensed distributor, with the bond required by Section 3 of Article VII of this Act, the Commission shall, without the payment of any fee, immediately issue such importing distributor's license to the applicant, which shall allow the importation of alcoholic liquor by the licensee into this State from any point in the United States outside this State, and the purchase of alcoholic liquor in barrels, casks or other bulk containers and the bottling of such alcoholic liquors before resale thereof, but all bottles or containers so filled shall be sealed, labeled, stamped and otherwise made to comply with all provisions, rules and regulations governing manufacturers in the preparation and bottling of alcoholic liquors. The importing distributor's license shall permit such licensee to purchase alcoholic liquor, that is imported by a licensed foreign importer from a point outside the United States, from such foreign importer.

(d) A retailer's license shall allow the licensee to sell and offer for sale at retail, only in the premises specified in such license, alcoholic liquor for use or consumption, but not for resale in any form: Provided that any retail license issued to a manufacturer shall only permit such manufacturer to sell beer at retail on the premises actually occupied by such manufacturer.

• • •

Chapter 43, Section 122(e) Illinois Revised Statutes:

(e) Any person having been licensed as a manufacturer shall be permitted to receive one retailer's license for the premises in which he actually conducts such business, permitting the sale of beer only on such premises, but no such person shall be entitled to more than one retailer's license in any event, and, other than a manufacturer of beer as stated above, no manufacturer or distributor or importing distributor, or any subsidiary or affiliate thereof, or any officer, associate, member, partner, representative, employee or agent, or shareholder shall be issued a retailer's

license, nor shall any person having a retailer's license, or any subsidiary or affiliate thereof, or any officer, associate, member, partner, representative or agent, or shareholder be issued a manufacturer's license, importing distributor's license or distributor's license: provided that nothing in this Act contained shall prohibit any natural person, not a minor, intoxicated person, habitual drunkard, spendthrift or insane, feeble-minded or distracted person or persons who is an object of charity, from purchasing beer in not less quantity than by the keg or case directly from the manufacturer, importing distributor or distributor at his home, for use or consumption at such home and under no circumstances for sale or resale, subject to the reasonable regulation of the State Commission and of the local liquor control commissioner. As amended 1947, July 24, Laws 1947, p. 19, § 1.

STATEMENT OF THE CASE

This is but the second of a series of cases,[1] brought under 18 U.S.C., §1951 (and sometimes combined with counts charging violations of the perjury statute, 18 U.S.C. §1823, though not here) charging police officers of the City of Chicago with "extorting" monies, favors, and property from owners or operators of houses dispensing intoxicants, i.e. saloons, bars, lounges, inns, and the like.[2]

Generally, the theme is that, in return for the "overlooking" of minor deviations of law, (cars illegally parked, selling beer to minors, the cooling of a gin-oriented fracas between or among customers, with no harm inflicted), the proprietor gave the policeman (and sometimes

[1] We are informed that a petitioner named Moore has filed his Petition for Certiorari within the last 10 days.

[2] The United States Attorney for the Northern District of Illinois announced publicly this week that sixty-one indictments have been secured against Chicago Police Officers out of the only two police districts that have so far been the subject of investigation. There are twenty-one police districts in the City of Chicago.

his superior) an agreed monthly, usually paltry, amount, for foregoing ticketing and arresting for these violations, or the foregoing of a complaint before the Illinois Liquor Commission. These acts, the United States contends, constitute "extortion" under the Hobbs Act.

The facts of this particular case are fairly routine, and illustrative of the bases on which these many cases have been brought.

The proprietor, or the licensee, is the classic Government witness in this type of case, and so was he in this case.

During the period covered by the indictment, Petitioner DeMet was a sergeant on the Chicago Police Force and was the vice coordinator of the district which included the Scene Lounge. (Tr. 159-160, 226) In the latter part of November or the early part of December of 1969, DeMet, in plain clothes, accompanied by two or three other police officers in plain clothes, visited Louis King, the licensee of the premises at the Scene Lounge. (Tr. 154-156) The police officers sat at the bar and struck up a conversation with King. DeMet asked King, "How is it going?", and if King had any problems. King replied that he did have problems with parking outside his lounge. King's license permitted him to operate his bar until 4:00 a.m. The street in front of the Scene Lounge was subject to a 3:00 to 7:00 A.M. parking ordinance allowing parking alternately on each side of the street during those hours. King told DeMet that usually on week-ends when he was very busy a policeman would come in and he would have to pay $10 or $20. (Tr. 156-158) This conversation took place about two a.m. which was the busy time in the Scene Lounge. DeMet then asked King, "Is there a place that is more quiet?" so that they could talk. (Tr. 158) King and DeMet then went to the back room at the Lounge and closed the

door. In the back room DeMet said to King, "In order to avoid all this bull shit why don't you pay so much a month?" King then asked, "Now what's the mutuels?" DeMet replied, "Well you tell us." King then said, "well how about fifty dollars a month?" DeMet replied, "well O.K." (Tr. 159) King then called his wife who was working as a waitress in the Lounge that night and told her to bring him a $50 bill. Mrs. King brought the money in and gave it to King who then handed it to DeMet. (Tr. 159, 212)

King testified he spoke to DeMet that night because he "knew he [DeMet] was a vice coordinator and [King] was having these problems." (Tr. 159-160) King testified he paid the money to DeMet because he feared that if he did not pay he would jeopardize his liquor license and have more harassment. (Tr. 161)

Subsequently, in January of 1970 DeMet again visited King at the Scene Lounge in the company of some other police officers. DeMet said, "Can I see you for a few minutes?" DeMet and King then went into the back room. King called his wife into the back and she gave DeMet $50. (Tr. 168, 213) After DeMet was paid by King, the Kings had no further parking problems at the Scene Lounge. (Tr. 213)

This is the whole of the pertinent evidence.[3]

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[3] There was certain testimony by King that he gave the Petitioner $300.00 worth of liquor at the Christmas intervening between the time of the two fifty dollar payments. This is described in the indictment as gifts. Since neither bribery nor extortion is compatible with a gift, and since the Grand Jury which returned the indictment saw the transaction as a gift, we do not think that it is pertinent to consideration of the matters here involved, but we mention it lest we should be accused of overlooking or concealing pertinent facts. (Tr. 164-165, 221)

The Nexus To Interstate Commerce

The evidence indicated, that in the course of King's business, he sold various brands of liquor and beer in the Scene Lounge, as a retailer and on a drink-by-drink basis. He purchased Anheuser-Busch Company products, which had no beer producing plants in Illinois, from Anheuser-Busch's Chicago distributor. All beer distributed to customers of Anheuser-Busch products in Illinois, including the Scene Lounge, was produced out-of-state. It also was brought out by the evidence that liquor purchased by the Scene Lounge and manufactured out-of-state was purchased through Continental Distributing Company, a local distributor. (Tr. 108-110; 122-124; 151; 153)[4] The beer remained in the distributor's warehouses for a period from ten to eighteen days when it was then delivered locally. The liquor remained for longer periods.

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[4] Anheuser-Busch products, as well as the liquor were required, under Illinois law, to be purchased by any retailer from Illinois distributors, having precise distributional areas within the State. The Illinois Liquor Control Act is found at Chapter 43, Ill. Rev. Stats., 1971, and particularly Sections 115 (c) (b) and (d) and 121 (e). These provide that a local retailer of liquor may not obtain an importing distributors' license, and may not sell for resale. It is also provided that an importing distributor may not sell at retail. By Illinois law, the local retailer may obtain his goods *only* from Illinois distributors.

REASONS FOR GRANTING THE WRIT

This Court should issue its Writ of Certiorari to the United States Court of Appeals in this cause on the following grounds:

1.

The majority in this case[5] has construed a highly penal criminal statute in a manner that allows for punishment without any impact on interstate commerce, and adopts as a basis for conviction a government-sponsored theory of "affect" on interstate commerce which has no relation to fact, eliminating the basis of the power of Congress to legislate in this area.

On appeal, it was urged on the Court below that reversal was required on a "de minimis" argument in providing a nexus to interstate commerce. The Court of Appeals conceded the relationship was minimal, that any affecting of matters regarding interstate commerce shown by the record in this case is barely existent. The Court granted it is "small by most standards" (App. 9); but at App. 11 in text and footnote, the Court states that *no* matter, which affects interstate commerce, is without the purview of the Hobbs Act, however minimal. We suggest to the Court that this approach is erroneous.

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[5] Chief Judge Swygert, while concurring in the result, indicated he felt bound to do so by virtue of earlier decisions of the Seventh Circuit, from which he dissented unavailingly. His separate opinion, however, indicates his continuing conviction that the Statute (18 U.S.C. § 1951) has been stretched too far.

Several factors enter into this consideration that the "de minimis" conclusion is invalid. The first, of course, is that the umbrella which allows §1951 is the interstate commerce clause. (Art. 1, Sec. 8, Clause 3, Constitution of the United States) That the impact on interstate commerce may be barely existent to support conviction is incomprehensible. But add to that that, §1951, under the umbrella of the Interstate Commerce Clause, has enacted a statute that impresses a possible sentence of twenty years in the penitentiary. It is beyond belief that Congress intended a "small by most standards" affect on interstate commerce, "only indirectly caused by defendant's acts" should authorize the imposition of such an onerous punishment, which under Federal law is usually reserved for crimes of violence. We submit to the Court that the lower Court's refusal to countenance the "de minimis" defense in such circumstance renders the authorized sanction constitutionally suspect. Certainly a possible exposure to twenty years in prison for conduct "only indirectly caused by defendant's acts" and which has "small by most standards" affect on interstate commerce is cruel and unusual within the contemplation of the Eighth Amendment to the Constitution of the United States. The constitutional aspect should be faced now when the Court is authorizing conviction on the most minute of acts to support §1951—which toleration, in turn, would authorize twenty years imprisonment.

The evidence in this case extends the already over-extended application of §1951. In the Opinion below, the Court, rejecting the de minimis defense, points to some cases to illustrate the pervasive employment of "full application of the commerce power." There it discusses extortion deriving from the frustration of use of a pool table which came from on out-of-state source. Continuing

the Court gives an example of an instance where the assets of a drive-in restaurant were depleted by $100.00, with the added factor that a proprietor, in addition, gave $200.00 from his personal funds. (App. 11)

The case presently before the Court cannot be analogized to the pool table incident. It may be more closely analogized to the latter incident. Such cases are not, nor do they pretend to be, the type of conviction that was contemplated by Congress. These cases are an out-growth of hypothecation by the Government—apparently adopted by several Courts—that if a business's assets are depleted one whit, then it is proper to speculate that that one whit might (not would) have been spent on goods that had traveled in interstate commerce. The added fillip of the $200.00 from personal funds does not detract from this hypothecation, nor is it contended in the illustration that the $200.00 of personal funds would in itself have supported conviction. It was, and is here, the Government's usual proposal that the $200.00 of the proprietor in his own pocket might (not would) have been, in an emergency, put into the "till" of the business, from which they might (not would) have been invested in some commodity that has a scant impact on interstate commerce. We consider this the nadir of rationalization, for without interstate commerce there is no federal crime, and when the essence of the offense is grounded on extravagant speculation, the basis for jurisdiction is itself a speculation.

In this case $50.00 is supposed to have passed to this petitioner in December, 1969 and in January, 1970. The monies did not come out of the assets of the business. They did not come out of the personal funds of the proprietor, who *might* have put them into the assets of the business. They came from the wife of the proprietor, and she took them not from his pocket, not from the cash

register, but on each occasion respectively from her own purse or her own pocket. There is no history or contention that her funds had ever before been given or lent to the business. She is described in the indictment as an agent and employee of the business enterprise, a place known as "The Scene". There is no evidence at all that she was ever an agent of that business, doing business on its behalf in that capacity. She was a waitress, a bar-waitress. Admittedly she was an employee. Thus the unrealistic hypothesis of the Government is carried yet one step beyond prior cases: an employee gave the petitioner money, that employee might have (not would have) given that to the proprietor, though there is no evidence that such was the wont of either person; the proprietor then might have commingled this money with the assets of the business, and then the business might have purchased some goods affecting interstate commerce. We recognize that before Courts have indulged the fantastic speculations of the Government in this regard, but there must be a point where they go too far. We suggest that this is the point.

The Court of Appeal's description of the effect of §1951 cannot be equated with the constitutional grant of power to the Congress. That Court refers to §1951 as a law "which regulates matters 'affecting' interstate commerce . . .", and continues that it is a full application of the commerce power. Tacitly, we submit, the Court admits that that is not a regulation *of* commerce among the several states, as described in Article 1, Section 8, Clause 3. That Section of the Constitution gives the power to Congress "to regulate commerce . . . among the several states . . ." It does not go beyond that. A law which regulates matters "affecting" interstate commerce is not within the explicit definition of the powers of Congress, and this Court seems

to so indicate by the expansive description of the regulation of matters "affecting" interstate commerce. Matters "affecting" interstate commerce cannot be more expansive than any regulation of commerce itself.

2.

The Court of Appeals has decided this case through a rigid, literal reading of the Hobbs Act in a manner that conflicts with another statute of the United States (Title 27 U.S.C. §121); with the 21st Amendment to the Constitution of the United States; and with this Court's refusal to adopt such literalness in an analogous situation in United States v. Enmons, 93 S.Ct. 1007.

Title 18, U.S.C., §1951 may not be so employed that it collides with other laws of the United States. It is, of course, our submission that this case is in direct collision with Title 27, U.S.C. §121, which is in turn an implementation of the Twenty-First Amendment to the Constitution of the United States.[6] In a recent case of *United States* v. *Enmons*, 93 S.Ct. 1007, this Court held that a burden on commerce must be tolerated if it results from a prima facia exercise of protected collective bargaining rights under the labor acts. This Court refused implementation of the Hobbs Act in its literal wording, because it did so collide.

As this Court well knows, the Hobbs Act found its seeds and indeed its birth, in an attempt to prevent anarchy under the guise of legitimate labor objectives. The charge

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[6] The Twenty-First Amendment argument was not presented at the briefing stage. We are informed by Appeal Counsel that it was advanced on oral argument, and it was definitely a major thrust on Petition for Rehearing after affirmance. The argument is not recognized in the opinion, nor in the denial of the Petition for Rehearing.

of the indictment in the *Enmons* case constituted, as do practically all labor management disputes, a definite and direct impact on interstate commerce. There were allegations of actual physical violence within the direct wording of §1951, and since the case never left the pleading stage, we must assume they would have been proven. The field (labor) was the target of the Hobbs Act, and yet this Court said the Hobbs Act could not be enforced if it collided with another federal statute. Here we have edicted by federal statute (Title 27, U.S.C. §121) that intoxicants being in what we would ordinarily refer to as interstate commerce shall be treated to the same extent and in the same manner as though such intoxicants had been produced intrastate. The Court of Appeals opinion in this case insists upon a reading of §1951 that would ignore a statute of the same code, and of the same stature. This, under this Court's decision in *Enmons*, cannot be tolerated. But this case goes beyond *Enmons;* this case is buttressed by an Amendment (the Twenty-First) to the Constitution, that has curtailed the power of the Congress to regulate interstate commerce under Article 1, Section 8, Clause 3. Labor as such has no such direct constitutional mandate.

This Court's latest definitive interpretation of the 21st Amendment was in *Hostetter* v. *Idlewild*, 377 U.S. 324.

The *Hostetter* case makes two exceptions to the pervasive control of liquor traffic by the States:

> (1) Where it is destined for consumption on a federal reservation;
>
> (2) Where it is destined for consumption outside the United States.

A strong dissent from (2) above was also noted, and in so doing, some detailed attention was paid to the history of the adoption of the Twenty-first Amendment:

" . . . [T]he proposed amendment provided in Section 2, 'The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.' 76 Cong.Rec. 4138 (1933). That language is in the present Amendment.

But the proposal also contained a Section 3, not found in the present Amendment; that Section provided, 'Congress shall have concurrent power to regulate or prohibit the sale of intoxicating liquors to be drunk on the premises where sold.' Ibid. Proposing to leave even this remnant of federal control over liquor traffic gave rise to the only real controversy over the language of the proposed Amendment. Senator Wagner of New York, who could not have known that his State would because of today's opinion be the first to be denied control of liquor traffic within the State, opposed Section 3 because it would defeat the proposed Amendment's purpose 'to restore to the States control of their liquor problem.' Id., at 4145. Senator Wagner argued that giving the Federal Government even 'apparently limited power' would allow that power to be 'extended to boundaries now undreamed of and unsuspected' by those supporting the proposed Amendment. Id., at 4147. It is clear that the opposition to Section 3 and its elimination from the proposed Amendment rested on the fear, often voiced during the Senate debate, that any grant of power to the Federal Government, even a seemingly narrow one, could be used to whittle away the exclusive control over liquor traffic given the States by Section 2. Having heard those fears expressed, Senator Robinson of Arkansas, the Senate Majority Leader, asked for a vote 'to strike out Section 3.' Id., at 4171. It was because of these fears that the Senate then voted to take Section 3 out of the proposed Amendment while retaining Section 2 and its broad grant of power to the States. Id., at 4179.

During the debate the Senators brought out quite clearly what plenary powers Section 2, as it now appears in the Twenty-first Amendment, meant to give the States.

Senator Blaine of Wisconsin, chairman of the subcommittee which had held hearings on the resolution and floor manager of the resolution in the Senate, agreed that Section 3 'ought to be taken out of the resolution' and Section 2 left in, because the 'purpose of Section 2 is to restore to the State by constitutional amendment absolute control in effect over interstate commerce affecting intoxicating liquors which enter the confines of the States. Id., at 4143. Speaking of the same section, Senator Walsh of Montana, also a member of the subcommittee, said, 'The purpose of the provision in the resolution reported by the committee was to make the intoxicating liquor subject to the laws of the State once it passed the State line and before it gets into the hands of the consignee as well as thereafter.' Id., at 4219." *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 336-8.

Exclusive control by the States in these premises is clear.

3.

This case presents a fact circumstance that demonstrates an intention to influence official behavior or an intention to induce a breach of duty. It is clearly bribery. The conversion of the fact circumstances from bribery to extortion within the definition of the Hobbs Act is in direct conflict with the decision of the Fourth Circuit in United States v. Miller, 340 F.2d 421, and with the decision in United States v. Kubacki, E.D. Pa., 237 F.Supp. 638.

Title 18 U.S.C. §1951 (b)(2) provides that

"The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful

> use of actual or threatened force, violence or fear, or under color of official right."

Taken in the light most favorable to the government, the evidence at best establishes that, when the liquor store licensee told the petitioner his business was lessened when the men under petitioner's command faithfully enforced a parking prohibition between the hours of 3 and 4 A.M., his business suffered. The licensee offered him $50 per month to forebear, or see that his men forebore. It is to be noted that the licensee set the rate of payment to insure forbearance. No set of facts could be more clearly bribery.

Confronted with analogous facts, two courts have refused to accept the extortion rationale that was adopted in this case.

In *United States* v. *Kubacki*, 237 F.Supp. 638 (E.D. Pa. 1965), the government attempted to bring just such a situation within the Hobbs Act in Counts 1 and 2 of a 5-Count indictment. After a jury found defendants guilty upon all five counts, the District Court granted their motions for acquittal on Counts 1 and 2, the Hobbs Act counts. "The convictions stemmed from events surrounding the purchase of parking meters by the City of Reading during a period when defendant Kubacki was its mayor, and defendant Minker was allegedly a behind the scenes political power. There was evidence from which the jury could find, on the first two counts, that in connection with the purchase of 500 Duncan-Miller parking meters from the Koontz Equipment Company by the City of Reading, the defendants conspired to and did obtain from a representation of Koontz the sum of $3,000 for awarding the contract to Koontz." *Id.* at 640. In granting the defendants' motions for acquittal as to the Hobbs Act counts, the court stated as follows (footnotes omitted):

> "By definition, the essential ingredient of extortion under § 1951 is 'wrongful use of actual or threatened

> force, violence, or fear * * *.' Although the context in which 'fear' is used in that definition suggests apprehension of physical harm to person or property, it is clear that fear of economic loss is sufficient, . . . [citations omitted]" *Ibid.*

After detailing the evidence, wherein it was established that the "deal" was consummated after defendants initiated the bribe the court went on to find that the Hobbs Act had not been violated:

> "In the indictment . . . the government charged that Weidlick and Roach [representatives of Koontz and Duncan-Miller, respectively] were in fear that 'offers to sell parking meters * * * would not be considered for acceptance unless' they would consent to pay the amounts demanded. In simple terms, the government charged that these people were compelled to make a payoff for the privilege of bidding, i.e., for the privilege of competing for the award of the parking meter contract. The evidence established, instead, that Weidlich and Roach were bargaining for improper influence, for favored treatment, i.e., they were bargaining for the improper award of the contract to them without the necessity to compete.
>
> "In all the extortion cases cited by the government, the victim was compelled to pay for the exercise or enjoyment of a right or privilege already his, under threat and out of fear that if he did not comply with the demands he would be subjected to *unwarranted* interference, with resulting substantial harm to his business or property rights." *Id.*, at 641. (Emphasis added.)

It should be remembered that in the case at bar, there was no threat of subjecting the tavern owner to *unwarranted* interference; according to the government's theory of the case, petitioner would have been altogether war-

ranted in charging the tavern owner's customers with illegal parking.

The court in *Kubacki* continued:

> "The definition of extortion used in § 1951 is taken from New York law [United States v. Nedley, 255 F. 2d 350 (3d Cir. 1958)] and New York interpretations of that crime are helpful. Under New York law, the crimes of bribery and extortion are mutually exclusive. One who pays a bribe is equally as guilty as the one who receives it, 'which could never be the case with extortion.' People v. Dioguardi, N.Y.2d 260, 273, 203 N.Y.S.2d 870, 881, 168 N.E.2d 683, 692 (1960). The court in Dioguardi noted the *distinction between bribery and extortion, the essence of the one being the voluntary giving of something of value to influence the performance of official duty, the essence of the other being duress.* Applying that distinction to this case, the record is devoid of evidence of duress." *Ibid.* (Emphasis added.)

> "Reasonable minds could only arrive at the conclusion that what was involved in this case was bribery. If Weidlich and Roach had any fear at all, it was fear that they would not be successful in their efforts to exercise undue influence. [Similarly, any fear on the part of the tavern owner in the case at bar was fear that he would not be able to "buy" defendant out of charging him with having violated the traffic laws.] That is not the type of fear contemplated in 1951. They were 'victims' only to the extent of possible dissatisfaction with the price. [In *Kubacki*, as in the instant case, there was "bargaining" before an agreement was reached as to the price to be exacted in exchange for official favors] otherwise it is clear beyond question that they were willing participants, equally as guilty as the payees, in the scheme to obtain the award of the contract improperly.

> "The evidence in this case is insufficient, as a matter of law, to sustain conviction on charges of extortion [under Sec. 1951] and defendants are, therefore, entitled to acquittal on Counts I and II." *Id.* at 642.

We submit that the factual context and reasoning of the *Kubacki* case are directly in point. Remarks noting the similarities and showing that the same logic should compel the same result are interjected within the above quotations from that case.

In *United States* v. *Miller*, 340 F.2d 421 (4th Cir. 1965), one Miller, a candy distributor who did extensive business with Army commissaries, regularly paid co-defendant Lawrence, a federal commissary inspector, sums of money for a number of years to seek a preferred advantage in his dealings with the commissaries. Both he and Lawrence were indicted under the Federal bribery statute. Miller sought to interpose a defense that Lawrence's actions were extortion, and that therefore he was innocent of bribery, the Court in upholding his conviction noted:

> "Miller insists that the requested instructions were necessary to present to the jury a defense of extortion, an issue upon which the district judge refused to charge. The Government suggests that extortion cannot be a defense to a violation of 18 U.S.C.A. §201. This case, however, does not require that we decide the broad proposition urged upon us by the Government, for we do not think the evidence will support a claim of extortion. Although Miller in his statement did indicate that the reason he paid money to Lawrence was that he 'figured that I had to give him something or I would lose my business at Fort Meade", and although the threat of economic harm may under some circumstances result in extortion, Hornstein v. Paramount Pictures, 292 N.Y. 468, 55 N.E.2d 740 (1944), there was no proof introduced in this case to show that

> Lawrence had threatened Miller with economic harm unless the periodic payments continued. In any event, Miller by his payments was purchasing influence with and favored treatment from Lawrence. Fear of losing his illegal advantage if the payments were discontinued was not extortion." 340 F.2d at 425.

We submit here, as in *Kubacki* and *Miller,* petitioner committed no offense other than simple bribery, and not extortion.

4.

United States v. Enmons, 93 S.Ct. 1007, was explicit in enunciating the Federal-State balance, and in emphasizing that government should not intervene where states had laws sufficient and effective to vindicate their criminal jurisdiction. This type of action clearly impinges on that jurisdiction—and is illustrative of an ever-pervading federal intrusion. The writ of certiorari should issue, under the supervisory power, to determine whether the lower courts are implementing this Court's admonitions against intrusions on State jurisdiction.

The Government has increasingly used, or abused, Title 18, U.S.C. §1951 as a vehicle to control state government. In the *Enmons* case this Court made it very clear that the Government must abstain, on sovereign principles, from interfering with the criminal laws of the state. Thus it said:

> "First, this being a criminal statute, it must be strictly construed, and any ambiguity must be resolved in favor of lenity. *United States* v. *Wiltberger*, 5 Wheat. 76, 95; *United States* v. *Halseth*, 342 U.S. 277, 280; *Bell* v. *United States*, 349 U.S. 81, 83; *Arroyo* v. *United States*, 359 U.S. 419, 424; *Rewis* v. *United States*, 401 U.S.

808, 812. Secondly, it would require statutory language much more explicit than that before us here to lead to the conclusion that Congress intended to put the Federal Government in the business of policing the orderly conduct of strikes. Neither the language of the Hobbs Act nor its legislative history can justify the conclusion that Congress intended to work such an extraordinary change in federal labor law or such an unprecedented incursion into the criminal jurisdiction of the States. See *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 247-248; *United Constr. Workers* v. *Laburnum Constr. Corp.*, 347 U.S. 656, 665; *Garner* v. *Teamsters Local 776*, 346 U.S. 485, 488; *UAW Local 232* v. *Wisconsin Employment Relations Bd.*, 336 U.S. 245, 253.

"As we said last Term:

> '[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the Federal-State balance. Congress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the States. . . . [We] will not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction.' *United States* v. *Bass*, 404 U.S. 336, 349 (footnotes omitted)." 93 S.Ct. 1007 at 1015-1016.

There is no question that the local laws make bribery of a police officer, or even extortion by him, a state crime. Nor do we think that this Court is blind to the fact that §1951 is being employed as a vehicle to control all state government in every department, legislative, executive, and judicial.[7] If cases like this are allowed to be deemed

[7] Chicago Aldermen, Illinois legislators, and even the former governor of this State, have been indicted and convicted under this theory.

a proper exercise of federal legislation, then we have dual sovereignty over every activity that does not reach the now-attenuated "affects" on interstate commerce.[8] If we allow this act to be extended to the policing of the states and second guessing their power and criminal sanctions, one of the two dual sovereigns must capitulate and, power being power, it will be the states. The rejection of the de minimis doctrine and the indirect causation by the petitioner endorsed by this decision makes Government power absolute. It renders meaningless the Tenth Amendment reservation to the states of unspecified governmental pow- reservation to the states of unspecified governmental powers.

A legal provision succeeding §1951 is, in necessary sequence, §1952. There the Congress made a definite finding that it would enforce state laws, because the boundaries of the state made it impossible for the states to do it themselves. Whatever the ultimate validity of §1952, no such intent was evidenced in respect to §1951. The *Enmons* decision, particularly that part of it we have quoted at length hereinabove, would nullify any attempted extension of §1951 to the perimeters that permit federal interference with the states under §1952. This case goes farther, for at least §1952 recognizing an intrusion on State law, has specified perimeters. As evidenced by this case, perimeters have been abolished, without any indication by the legislature that such was its intent.

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[8] The brief-writers are aware of a current effort by the F.B.I. and U.S. Attorney's office in Chicago, Ill. to propose to the Federal Courts that local burglaries of chain-stores, tending to deplete their available resources (despite insurance) involves a Hobbs Act violation. Clearly this is Federal effort to supplant local law enforcement.

CONCLUSION

Wherefore, this Petition respectfully prays the Court to issue its Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

ANNA R. LAVIN
EDWARD J. CALIHAN, JR.
Attorneys for Petitioner,
George DeMet

APPENDIX

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

SEPTEMBER TERM, 1972 JANUARY SESSION, 1973

No. 72-1657

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

GEORGE DEMET, *Defendant-Appellant.*

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 72 CR 247

ABRAHAM L. MAROVITZ, *Judge*

ARGUED JANUARY 9, 1973 — DECIDED OCTOBER 25, 1973

Before SWYGERT, *Chief Judge,* and KILEY and FAIRCHILD, *Circuit Judges.*

FAIRCHILD, *Circuit Judge.* Defendant was convicted by a jury of obstructing, delaying and affecting commerce and the movement of articles in commerce by extortion in violation of 18 U.S.C. § 1951, commonly called the Hobbs

Act.[1] On this appeal defendant asserts error in jury selection, insufficiency of the evidence as to extortion and effect on interstate commerce, and erroneous rulings during the course of trial. We have considered these contentions, find none meritorious and affirm the conviction.

Viewing the evidence in a light most favorable to support the verdict, the following facts appear:

Louis King owned a Chicago cocktail lounge called "The Scene" during the period covered by the indictment, November, 1969 to February, 1970. King purchased some of the beer for his business from the Chicago branch of Anheuser-Busch. It was brewed outside Illinois. Some of the liquor he purchased came from distilleries in other states or countries.

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[1] In pertinent part, § 1951 provides:

"(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section—

(1) . . . .

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction."

During the period of the indictment, defendant was a Chicago police officer and vice coordinator assigned to the district where the Scene was located.

In late November or early December, 1969, defendant and several other police officers visited the Scene. They sat at the bar and defendant asked King how it was going and whether King had any problems. King described how a police sergeant would come into the lounge on weekend nights and require payment of $10 or $20 in exchange for not enforcing a late night parking ordinance which went into effect one hour before closing. King also told defendant that police officers would come on week nights and unjustifiably accuse him of staying open after hours.

This conversation occurred at about 2:00 A.M. when the lounge was busy. Defendant asked if there was a more quiet place where they could talk. King led defendant to a back room. Once in the room, defendant said, "In order to avoid all this bullshit why don't you pay so much a month." King asked, "Now, what's the mutuels?" To which defendant replied, "Well you tell us." King offered $50.00 a month, a sum which defendant found acceptable. King and his wife made the payment to defendant.

King testified that he paid the money to defendant because he feared that if he did not pay it might jeopardize his liquor license and lead to more "harassment."

Just before Christmas, 1969, defendant and three other officers all in plain clothes entered the Scene Lounge. During conversation with King one of the officers mentioned that a gift had been given or would be given to the "Commander." One of the officers asked what King was going to give. King displayed a bottle of Grand Metexa. Then one of the officers asked, "Well what about

us?" King replied, "O.K. Stop around Christmas and I will have something for you."

King testified that he inferred from this conversation that if he didn't cooperate he might be charged with liquor violation or risk of loss of his license.

Later during the Christmas week, defendant stopped at the Scene between 7:00 and 8:00 P.M. before it had opened for business. He had previously called to make sure someone would be there. King had two cases of liquor and two extra bottles waiting for him when he arrived, and assisted in loading the cases into defendant's car. King estimated the value to be over $300.00.

Sometime between Christmas, 1969 and New Year's Day, King had another conversation with defendant at the police station. King complained to defendant that even though he was paying $50.00 a month, he had been forced to pay $300.00 to a sergeant and a patrolman the previous evening. Defendant professed ignorance of the incident and suggested that they go see the "boss." Defendant and King then went to the district commander's office. Defendant went in to see the commander and, after a few minutes, King was invited into his office.

In the presence of defendant, King related to the commander the incident of the previous night. King then asked, "Why am I paying $50.00 a month when I am brought into the station for after hours and forced to pay $300.000 a month?" The commander replied, "I will take care of this. Don't worry about it."

In January, 1970, defendant again visited King at The Scene in the company of other police officers. Defendant asked to see King for a few minutes. The two then went to a back room. King called his wife; Mrs. King came in and gave defendant $50.00.

Following the payments, The Scene had no further parking problems.

1. *Claim That Challenges For Cause Were Improperly Overruled.*

Shortly before defendant's trial began, another vice officer from defendant's district was tried and convicted of extortion of a tavern owner in violation of §1951 before another judge of the district court. In other respects the two cases were unrelated.

During the selection of the jury for this case, seven, ultimately, of those called had served on the earlier jury. One indicated that his judgment might be affected by such service, and was excused for cause. Each of the other six testified he could be impartial, and defendant's challenges of them for cause were overruled. Defendant exhausted his preemptory challenges, using five for other jurors, but one of the jurors from the other case remained on the jury.

Mere service on another jury confronted with similar charges and similar facts is not, even where some of government witnesses are the same, the type of experience from which the law will infer bias.[2] We find no error.

2. *Alleged Failure to Prove Extortion.*

Under § 1951 extortion is defined as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened fear, or under color of official right." The government's proof was directed

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[2]*United States* v. *Haynes*, 398 F.2d 980, 984 (2nd Cir., 1968), *cert. denied*, 393 U.S. 1120; *United States* v. *Cooper*, 332 F.2d 790 (3rd Cir., 1964); *United States* v. *Estrada*, 441 F.2d 873, 879 (9th Cir., 1971).

to showing that King feared economic loss should he not comply with defendant's demands.

Defendant contends that the government's proof was an insufficient basis upon which to convict for extortion. Because King admitted his encounters with the defendant were friendly and defendant never said nor intimated he would cause "trouble," defendant contends that King's conduct was not motivated by fear as required by §1951. Rather, defendant argues, King willingly gave money to defendant because it brought certain advantages (such as non-enforcement of parking restrictions) to which he was not lawfully entitled. This, in essence, defendant argues that he was merely receiver of bribes and could therefore not be guilty of extortion.

Fear, as used in §1951, includes not only fear of physical violence but fear of economic harm, as well. *Bianchi* v. *United States*, 219 F.2d 182, 189 (8th Cir., 1955), *cert. denied*, 349 U.S. 915; *United States* v. *Sopher*, 362 F.2d 523, 527 (7th Cir., 1966), *cert. denied*, 385 U.S. 928. It is not necessary that this fear be a consequence of a direct threat, it is enough that the circumstances surrounding the alleged extortion render the victim's fear reasonable. See e.g., *United States* v. *Tolub*, 309 F.2d 286, 288-289 (2nd Cir., 1962); *United States* v. *Addonizio*, 451 F.2d 49, 73 (3rd Cir., 1972), *cert. denied*, 405 U.S. 936; *Carbo* v. *United States*, 314 F.2d 718, 740 (9th Cir., 1963); *Callanan* v. *United States*, 223 F.2d 171, 175-176 (8th Cir., 1955); *United States* v. *Glasser*, 443 F.2d 994, 1006 (2nd Cir., 1971), *cert. denied*, 404 U.S. 854.

Indeed, fear may be present even if confrontations between the victim and the alleged extorter appear friendly:

> "The facts that relations between the victims and the extorters were often cordial is not inconsistent with

> extortion. Knowing that they were at the mercy of the Attorney General's office, it is a fair inference that the victims felt that to save their businesses they had to keep the extorters satisfied." *United States* v. *Hyde*, 448 F.2d 815, 834 (5th Cir., 1971), *cert. denied*, 404 U.S. 1058.

Finally, it is important to note that the economic loss which the victim fears may be a consequence of action which the alleged extorter has a duty to take:

> "It is the wrongful use of an otherwise valid power that converts dutiful action into extortion. If the purpose and effect are to intimidate others, forcing them to pay, the action constitutes extortion. Put another way, it is the right to impartial determination of the issue on the merits (i.e. whether to enforce the law or whether to picket or strike) that the victim is deprived of when these actions are taken for the purpose of coercing him into paying. The distinction from bribery is therefore the initiative and purpose on the part of the official and the fear and lack of voluntariness on the part of the victim." *United States* v. *Hyde*, *supra*, at 833.

While portions of King's testimony taken with other evidence may be consistent with defendant's view that King freely gave money and liquor to obtain advantages, the jury could reasonably infer from all the circumstances, including defendant's official position, that King was in fear of harm to his business, his fear was reasonable, and defendant exploited it to extort money and liquor.

If early morning customers of The Scene had their cars ticketed, they might take their business elsewhere or at least leave earlier. An arrest for staying open after hours could lead to loss of the liquor license. Defendant, the vice coordinator of the district promised to eliminate these concerns in exchange for a monthly payment. There

was support for a finding that King believed that implicit in defendant's offer was the threat of continued "parking problems" and other harassment if the money (and later liquor) was not forthcoming.

In arguing for acquittal, defendant's counsel presented his view of the facts, i.e. that King was a willing participant and that any fear which King felt was unreasonable. The jury was instructed that in order for defendan'ts conduct to be considered extortion defendant must obtain the money through a wrongful use of fear, including fear of economic harm, and that the fear must be reasonable. Thus the issue of whether King gave money to defendant voluntarily in order to obtain certain advantages or out of fear that if the money was not forthcoming he would be subject to police harassment was squarely presented to the jury.

The jury apparently thought King's conduct was induced by fear and that defendant's conduct constituted extortion. We cannot say the verdict was not supported by substantial evidence.[3]

3. *Alleged Failure to Affect Interstate Commerce.*

Extortion is an offense against the United States when the extorter "in any way or degree obstructs, delays or affects commerce or the movement of any article or commodity in commerce, . . ." 18 U.S.C. § 1951(a). In order to satisfy the interstate commerce element, the government offered proof that some of the beer and liquor pur-

[3] Because we cannot accept defendant's view of the facts, it is not necessary for us to reach the question of whether bribery and extortion are mutually exclusive. Nevertheless, we note that at least one circuit has held that they are not. See, *United States* v. *Kahn*, 472 F.2d 272, 278 (2nd Cir., 1973), *cert. denied*, 41 L.W. 3606.

chased for The Scene had out of state origins, that in one instance a national corporation shipped its product across state lines to a Chicago warehouse from which it was delivered to The Scene and that in another instance a local company purchased liquor from out of state producers and then resold it to The Scene and others.

Relying primarily on cases applying the Fair Labor Standards Act, defendant argues that by the time The Scene acquired these beverages they were no longer in interstate commerce and that any extortion therefore could have no effect on interstate commerce. Because of differences in the statutes, such decisions are not controlling as to the requisite manner or degree of interference with commerce that may justify conviction under the Hobbs Act. *United States* v. *Kramer*, 355 F.2d 891, 896 (7th Cir., 1966), *vacated in part on other grounds*, 384 U.S. 100.

Although King's business was primarily local, depletion of King's assets by the goods and money extorted, or the cessation of his business if he did not yield and his fears were realized, would tend to reduce the demand for and amount of beer and liquor moving into Illinois. The effect on interstate commerce would exist, though small by most standards, and only indirectly caused by defendant's acts. There are obvious questions as to the most desirable division between the states and the federal government of the function of enforcing good order, but given the existence of an impact of defendant's conduct on interstate commerce, the question is whether the Hobbs Act must be construed as stopping some margin short of full application of the commerce power.

"The commerce clause endows Congress with full and plenary power to do anything and everything necessary to

protect interstate commerce — The specific question is whether in the statute involved the Congress has seen fit to exercise all of its power." *Walling* v. *Goldblatt Bros.*, 128 F.2d 778, 781 (7th Cir., 1942).

When a law purports to regulate activities "in commerce" something less than the full commerce power is exercised. *Walling* v. *Goldblatt, supra.* On the other hand, at law which regulates matters "affecting" interstate commerce is within, though a more nearly full application of, the commerce power.[4]

Section 1951 clearly contemplates a full application of the commerce power. It proscribes extortion which "in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce. . . ." In *United States* v. *Stirone*, 361 U.S. 212, 215, 4 L.Ed 2d 252, 255 (1960), the Supreme Court said of the Hobbs Act:

> " 'That Act speaks in broad language, manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate commerce

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[4] See *United States* v. *Perez*, 402 U.S. 146, 150 (1971). As noted there, where an indirect effect on interstate commerce or its regulation is shown, federal power can include regulation of the price of intrastate milk, *United States* v. *Wrightwood Dairy Co.*, 315 U.S. 110 (1942); the production of wheat grown wholly for home consumption, *Wickard* v. *Filburn*, 317 U.S. 111 (1942), and policies of hotels and restaurants, *Atlanta Motel* v. *United States*, 379 U.S. 241 (1964) and *Katzenbach* v. *McClung*, 379 U.S. 294 (1964).

> by extortion, robbery or physical violence.' The Act outlaws such interference 'in any way or degree.' "[5]

Because Congress has seen fit to exercise its full power under the commerce clause, extortionate conduct having an arguably *de minimis* effect on commerce may nevertheless be punished. *Battaglia* v. *United States*, 383 F.2d 303, 305 (9th Cir., 1967), *cert. denied*, 390 U.S. 907 (extortion resulted in a pool table from an out of state source being kept from use); *United States* v. *Augello*, 451 F.2d 1167 (2nd Cir., 1971), *cert. denied*, 405 U.S. 1070, (assets of drive-in restaurant which purchased mostly from an out-of-state concern depleted by $100; proprietor, in addition, gave $200 from his personal funds.). See also *Glasser* v. *United States*, 443 F.2d 994 (2d Cir., 1971), *cert. denied*, 404 U.S. 854; *United States* v. *Tropiano*, 418 F.2d 1069, 1076 (2d Cir., 1969), *cert. denied*, 397 U.S. 1021; *United States* v. *Mitchell*, 463 F.2d 187 (8th Cir., 1972).

Where the victim of extortion, as here, customarily obtains inventory which has come from outside the state, obstruction and delay of, and effect upon commerce may, for the purpose of the Hobbs Act, be found in curtailment of the victim's potential as a buyer of such goods. This may be traced either through the depletion of his assets by his fulfillment of the extortionate demands or the harm which would follow if the threats were carried

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[5] We have considered the Supreme Court's 1971 interpretation of the Travel Act as a less than full application of the commerce power, and the policy factors the Court suggests Congress may have considered. *Rewis* v. *United States*, 401 U.S. 808, 812 (1971). The two statutes are differently structured. We do not conclude that we are authorized, in a Hobbs Act case, to create a formula under which an impact on interstate commerce is to be dismissed as *de minimis*.

out. See *United States* v. *Pranno*, 385 F.2d 387 (7th Cir., 1967), *cert. denied*, 390 U.S. 944, 972; *United States* v. *Battaglia*, 394 F.2d 304, 312 (7th Cir., 1968), *vacated on other grounds*, 394 U.S. 310; *United States* v. *Amabile*, 395 F.2d 47, 49-50 (7th Cir., 1968).

4. *Allegedly Prejudicial Reference.*

When King described his first conversation with defendant, he testified that when defendant suggested paying money each month, he asked defendant "Now, what's the mutuels," The prosecutor asked why King used the word "mutuels," and King said he had given money to policemen before and that was the term always used. On objection, the court instructed the jury to disregard the answer. The prosecutor asked the question again and King said he had "heard the word before in connection with police officers." The court permitted this answer to stand.

The conversation already described by King had included King's assertion that he had made frequent payments to a police officer concerning late night parking. We gather from colloquy out of the presence of the jury that he had made payments to other officers in the past. These were irrelevant, but the meaning of the word "mutuels" was not. It is dubious that significant prejudice to defendant arose, there was need for explanation of the word, and the district court did not abuse its discretion in handling the matter.

The judgment is affirmed.

SWYGERT, *Chief Judge*, concurring.

Several years ago I took issue by dissent with a holding of this court that a depletion of corporate reserves comprised an "interference with interstate commerce" within the meaning of the Hobbs Act where a corporation was engaged in interstate commerce. *United States* v. *Amabile*, 395 F.2d 47, 54 (7th Cir. 1968), *cert. denied*, 401 U.S. 1971. My concern was centered on the unlimited reach of the doctrine espoused by the majority:

> If a depletion of reserves is all that is necessary to show the requisite affect on commerce, then a threat of any kind to extract money made to a person who happens to operate a business engaged to any extent in interstate commerce comes within the statute's proscription. Under this rationale, a retail store owner, for example, would be afforded federal protection from extortion, regardless of the nature or the likely affect of the threat, simply because his stock of merchandise had in some measure moved in interstate commerce. 395 F.2d at 55.

Exactly what I apprehended in 1968 has today come to pass. My misgivings, however, did not persuade my brethren in *Amabile*, and I stand by the decision reached in this case as the law of the circuit.

I would also narrow what some might read to be the holding of the majority on the question of extortion under the Hobbs Act. DeMet was prosecuted below for a violation of that portion of the Hobbs Act which makes illegal "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened fear." As my colleagues recognize, the proof of the Government was directed to demonstrating a fear of economic loss on the part of King. Proof of fear may not have been

necessary had the Government chosen to rely on another provision to the Hobbs Act, namely, that prohibiting "the obtaining of property from another, with his consent, . . . *under color of official right.*" (emphasis supplied). It is, of course, hardly appropriate to render a decision on that issue in this case, and I express no views on it.*

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

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* It is worthy of note, however, that an argument has been made in the literature that this provision renders criminal any reception of money (not rightfully due) "under color of official right" by a police officer or other public official, without reference to whether the facts which surround the receipt characterize the action as bribery or extortion. *See* Stern, *Prosecutions of Local Political Corruption Under the Hobbs Act: The Unnecessary Distinction Between Bribery and Extortion.* 3 SETON HALL REV. 1 (1971).

APPENDIX B

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

November 26, 1973

Before

Hon. LUTHER M. SWYGERT, Chief Judge
Hon. ROGER J. KILEY, Circuit Judge
Hon. THOMAS E. FAIRCHILD, Circuit Judge

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 72-1657 vs.

GEORGE DeMET,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

(72 CR 247)

On consideration of the petition for rehearing filed in the above-entitled cause,

IT IS HEREBY ORDERED that the petition for rehearing in the above-entitled appeal be and the same is hereby denied.

No. 73-989

MICHAEL RODAK, JR

In the Supreme Court of the United States

OCTOBER TERM, 1973

GEORGE DEMET, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-989

GEORGE DEMET, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the government failed to prove that certain payments he received both affected interstate commerce and constituted extortion.

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of affecting interstate commerce by extorting money and liquor from the owner of a cocktail lounge, in violation of 18 U.S.C. 1951. He was sentenced to one year's imprisonment. The court of appeals affirmed (Pet. App. A).

1. The evidence showed that in December 1967, Louis King owned The Scene Cocktail Lounge where he sold beer purchased from Anhauser-Busch Company and liquor purchased through Continental Distributing Company (Tr. 151, 153).[1] Both companies distributed from outside the state of Illinois to The Scene Cocktail Lounge during the period covered by the indictment (Tr. 108-109, 122-124, 132-135, 144-145).

In the latter part of November or the early part of December 1969, petitioner, an officer in the Chicago Police Force and vice-coordinator of the district which included The Scene, visited King at the lounge (Tr. 154-156, 159-160, 226). Petitioner was in plain clothes and was accompanied by two or three other police officers in plain clothes (Tr. 154-156). They sat at the bar and began to converse with Louis King. Petitioner asked King, "How is it going?" He also asked if King had any problems. King replied that he did have problems with parking outside the lounge. King's license permitted him to operate until 4:00 a.m. and the street in front of the lounge was subject to a 3:00 a.m. to 7:00 a.m. parking ordinance with alternate parking on each side of the street. King told petitioner that usually on week-ends, when he was very busy, he would have to pay a policeman $10 or $20 to avoid trouble. King also told petitioner that uniformed police officers had been coming into the lounge during the wek to tell him that he was

[1] "Tr." refers to the transcript of proceedings at trial.

operating his lounge after hours. King told petitioner that there was no basis for this allegation because he was not open after hours (Tr. 156-158). Petitioner then asked King, "Is there a place that is more quiet?" where they could continue the conversation (Tr. 158). Petitioner and King then entered a back room where petitioner said to King "In order to avoid all this bull shit why don't you pay so much a month?" King then asked, "Now what's the mutuals?" Petitioner replied, "Well you tell us." King responded, "Well how about fifty dollars a month?" Petitioner replied, "Well, O.K." (Tr. 159). King then asked his wife who was working as a waitress to bring him a $50 bill. Mrs. King gave King the bill and King in turn gave it to petitioner (Tr. 159, 212).

King testified that at the time of the conversation with petitioner he knew petitioner was a vice-coordinator and that he paid petitioner because he was afraid not to do so would jeopardize his liquor license and subject him to more harassment (Tr. 161).

Just before Christmas of the same year, petitioner and three other plainclothes officers again entered The Scene. They had a drink and engaged King in conversation. One of the officers brought up the question of a gift to the Commander. King, when asked what he was going to give the Commander, showed the officers a ceramic bottle of Grand Metaxa liquor. One of the officers then said, "Well what about us?" King replied, "O.K. Stop around Christmas and I will have something for you" (Tr. 163). As a re-

sult of this conversation, King felt that if he did not cooperate it would lead to a charge of liquor violations and possible loss of his license (Tr. 164).

Later during Christmas week, petitioner drove to The Scene about 7:00 p.m., before the longe had opened. He had previously called the lounge and spoken to Mrs. King to make sure that someone would be there (Tr. 164-165, 221). Petitioner parked his car in front of The Scene. King opened the door for petitioner and after exchanging greetings King helped petitioner carry more than two cases of liquor to petitioner's car. This liquor was worth approximately $300 (Tr. 165).

During the same week King had another conversation with petitioner at the police station. King said to petitioner, "What's going on? I am paying $50 a month and last night I was brought into the station, I was forced to pay $300 by a sergeant and patrolman." Petitioner said that he was unaware of the incident and they had better go see the boss. Petitioner and King then went upstairs to the Commander's office. Petitioner went inside while King waited in the secretary's office. After three or four minutes, King went inside with petitioner. In the presence of petitioner, King told the Commander, "Why am I paying $50 a month when I am brought into the station for after hours and forced to pay $300 a month? I don't know what is going on." The Commander said that he had an appointment but, "I will take care of this. Don't worry about it" (Tr. 166-168).

Thereafter, in January 1970, petitioner went to The Scene with other police officers. Petitioner asked King if he could see him. After petitioner and King went to the back room, King called his wife and she gave petitioner $50 (Tr. 168, 213). After petitioner was paid, the Kings had no further parking difficulties in front of the lounge (Tr. 213).

2. Petitioner's contentions that the government failed to prove that the payments affected interstate commerce and constituted "extortion" as defined in the Hobbs Act, were properly rejected in the opinion of the court of appeals. We rely upon the following portion of the opinion (Pet. App. A, pp. A8-A12):

> Extortion is an offense against the United States when the extorter "in any way or degree obstructs, delays or affects commerce or the movement of any article or commodity in commerce, . . ." 18 U.S.C. § 1951(a). In order to satisfy the interstate commerce element, the government offered proof that some of the beer and liquor purchased for The Scene had out of state origins, that in one instance a national corporation shipped its product across state lines to a Chicago warehouse from which it was delivered to The Scene and that in another instance a local company purchased liquor from out of state producers and then resold it to The Scene and others.
>
> Relying primarily on cases applying the Fair Labor Standards Act, defendant argues that by the time The Scene acquired these beverages they were no longer in interstate commerce and that any extortion therefore could have no effect on interstate commerce. Because of differences

in the statutes, such decisions are not controlling as to the requisite manner or degree of interference with commerce that may justify conviction under the Hobbs Act. *United States* v. *Kramer*, 355 F.2d 891, 896 (7th Cir., 1966), *vacated in part on other grounds*, 384 U.S. 100.

Although King's business was primarily local, depletion of King's assets by the goods and money extorted, or the cessation of his business if he did not yield and his fears were realized, would tend to reduce the demand for and amount of beer and liquor moving into Illinois. The effect on interstate commerce would exist, though small by most standards, and only indirectly caused by defendant's acts. There are obvious questions as to the most desirable division between the states and the federal government of the function of enforcing good order, but given the existence of an impact of defendant's conduct on interstate commerce, the question is whether the Hobbs Act must be construed as stopping some margin short of full application of the commerce power.

"The commerce clause endows Congress with full and plenary power to do anything and everything necessary to protect interstate commerce—The specific question is whether in the statute involved the Congress has seen fit to exercise all of its power." *Walling* v. *Goldblatt Bros.*, 128 F.2d 778, 781 (7th Cir., 1942).

When a law purports to regulate activities "in commerce" something less than the full commerce power is exercised. *Walling* v. *Goldblatt*, *supra*. On the other hand, at [*sic*] law which regulates matters "affecting" interstate commerce is with-

in, though a more nearly full application of, the commerce power.

Section 1951 clearly contemplates a full application of the commerce power. It proscribes extortion which "in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce. . . ." In *United States* v. *Stirone*, 361 U.S. 212, 215, 4 L.Ed 2d 252, 255 (1960), the Supreme Court said of the Hobbs Act:

> " 'That Act speaks in broad language, manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery or physical violence.' The Act outlaws such interference 'in any way or degree.' "

Because Congress has seen fit to exercise its full power under the commerce clause, extortionate conduct having an arguably *de minimis* effect on commerce may nevertheless be punished. *Battaglia* v. *United States*, 383 F.2d 303, 305 (9th Cir., 1967), *cert. denied*, 390 U.S. 907 (extortion resulted in a pool table from an out of state source being kept from use); *United States* v. *Augello*, 451 F.2d 1167 (2nd Cir., 1971), *cert. denied*, 405 U.S. 1070, (assets of drive-in restaurant which purchased mostly from an out-of-state concern depleted by $100; proprietor, in addition, gave $200 from his personal funds.). See also *Glasser* v. *United States*, 443 F.2d 994 (2d Cir., 1971), *cert. denied*, 404 U.S. 854; *United States* v. *Tropiano*, 418 F.2d 1069, 1076 (2d Cir., 1969), *cert. denied*, 397 U.S. 1021; *United States* v. *Mitchell*, 463 F.2d 187 (8th Cir., 1972).

> Where the victim of extortion, as here, customarily obtains inventory which has come from outside the state, obstruction and delay of, and effect upon commerce may, for the purpose of the Hobbs Act, be found in curtailment of the victim's potential as a buyer of such goods. This may be traced either through the depletion of his assets by his fulfillment of the extortionate demands or the harm which would follow if the threats were carried out. See *United States* v. *Pranno*, 385 F.2d 387 (7th Cir., 1967), *cert. denied*, 390 U.S. 944, 972; *United States* v. *Battaglia*, 394 F.2d 304, 312 (7th Cir., 1968), *vacated on other grounds*, 394 U.S. 310; *United States* v. *Amabile*, 395 F.2d 47, 49-50 (7th Cir., 1968). [Footnotes omitted.]

We note in addition that petitioner's reliance on *United States* v. *Kubacki*, 237 F. Supp. 638 (E.D. Pa.), and *United States* v. *Miller*, 340 F. 2d 421 (C.A. 4), is misplaced. In *Kubacki* the court stated that the definition of extortion in the Hobbs Act derived from New York law, under which bribery and extortion are mutually exclusive. But see *United States* v. *Addonizio*, 451 F. 2d 49, 77 n. 35 (C.A. 3), certiorari denied, 405 U.S. 936. Whether or not the New York bribery-extortion distinction is carried over into the Hobbs Act, however, is irrelevant in the instant case. Unlike *Kubacki*, where improper payments were made to obtain the award of a contract, here the payments were made under duress, which is the essence of the crime of extortion. See *Kubacki*, *supra*, 237 F. Supp. at 641; *Addonizio*, *supra*, 451

F.2d at 72. In *Miller* the defendant attempted to raise extortion as a defense to the charge of bribery (the converse of petitioner's claim here). The court in *Miller* pointed out that there was no proof of any threat of economic harm. Here, on the other hand, there was ample evidence from which the jury could infer that King made the payment to petitioner under the implied threat of economic harm.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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Solicitor General.

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